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August 12, 1997

MEMORANDUM

TO: The Commission
FROM: Scott E. Thomas
Commissioner

AGENDA ITEM
For Meeting of: 8-14-97

SUBMITTED LATE

SUBJECT: Draft Advisory Opinion 1997-12 (Agenda Document #97-55)

I am troubled that the draft does not establish a line of analysis that will help us and the regulated community make the distinctions needed in this area. While I think allocation is helpful, the draft does not give any practical guidance as to how to distinguish certain legal expenses that don't require allocation (items 1, 2, 4, 5, and 6) and those that do (items 3 and 7). (I believe item 8 clearly relates to legal compliance with FECA and can therefore be treated as a campaign expense.)

Part of the problem with analyzing this request is that the categories created by the requestor do not neatly divide the legal expenses at issue. For example, it is difficult to distinguish between expenses to review and monitor the allegations made against Mr. Costello in the press (item 1) and expenses to investigate the factual allegations in order to respond (item 3).

We would give better guidance if we set out the types of expenses we think qualify for 100% payment with campaign funds, and those we think require allocation. In that regard, it makes more sense to me to say:

1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds if the person is a candidate or federal officeholder;

2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;

3) 50% of any legal expense not covered by 1 above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds if the person is a candidate or officeholder and is providing substantive responses to the press (beyond pro forma "no comment" statements).

With the foregoing analytical framework, the primary question becomes one of determining if the legal expenses relate directly to allegations arising from campaign or officeholder activity. In the matter at hand, as to allegations that Mr. Costello supported legislation as part of a plan to set up a business venture in which he had a secret interest, there is a direct relation to his legislative function. Accordingly, legal expenses to research this issue and prepare him for testimony in connection with this issue would be payable 100% with campaign funds. As to allegations that Mr. Costello attempted to replace a prosecutor with Mr. Cueto, this does not relate directly to any campaign or officeholder activity. Accordingly, legal expenses to research and prepare Mr. Costello would, at best, qualify for 50% payment with campaign funds if responses to the press are required. As to allegations that Mr. Costello was a "silent partner" in business dealings with Mr. Cueto and Mr. Venezia (in some connection other than the one noted above), there again would be no relation with the campaign or Mr. Costello's officeholder activities, and only 50% of the legal research and preparation expenses could be paid in order to make press responses.

A standard that draws lines based on whether the expense relates to the campaign or officeholder duties tracks the personal use ban in the statute. The draft, on the other hand, would have allowed 100% of the costs of legal research and preparation expenses relating to any allegation in the press (under the broad description of items 1 and 2), yet would have allowed only 50% of the very similar-sounding expenses described in items 3 (investigating "the factual allegations") and 7 ("represent[ing] Mr. Costello . . . in anticipation of the grand jury appearance and in conjunction with the possibility that he might testify at trial").

Accordingly, I would substitute the following for the language that begins on page 8, line 5, and ends on page 10, line 10:

The commission concludes that the following analysis should apply to items 1 through 7 in your list of legal services:

- 1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because you are a candidate or federal officeholder;*
- 2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;*
- 3) 50% of any legal expense not covered by 1. above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds because you are a candidate or federal officeholder and are providing substantive responses to the press (beyond pro forma "no comment" statements).*

Thus, any legal expenses for preparing press releases and conducting press conferences can be paid 100% with campaign funds. Because they arise directly from your officeholder activity, the legal expenses relating to allegations that your vote in Congress was part of an impermissible plan to establish a business venture in which you held a secret interest can be paid 100% with campaign funds. On the other hand, the legal expenses relating to allegations that you were impermissibly involved with an effort to replace a state prosecutor or were improperly involved as a silent partner in business dealings with Mr. Cueto or Mr. Venezia (other than the matter associated with your legislative vote) can only be paid 50% with campaign funds. Although these expenses do not directly relate to allegations arising from your campaign or officeholder activity, you have had to conduct research and preparation to respond to the press on these matters.

With the foregoing changes, the opinion will give readers a better sense of how to draw lines in this rather murky area. If the legal expenses relate directly to allegations arising from campaign or federal officeholder activity, campaign funds can be used for the full amount. A 50% allowance applies if other types of allegations are involved and the need to respond to the press can be established by a candidate or federal officeholder. Otherwise, campaign funds cannot be used at all.